To: **Alternatives to Bail Committee Members and Observers**

From: **Josh Bowers & Sandy Mayson**

Re: **Issues Raised by the Style Committee**

Date: **February 6, 2020**

Dear all –

We look forward to meeting again in a few weeks. The principal focus of discussion will be the working draft that you have received, which we will read as a group. This memo is secondary.

Following our last meeting, the Chairs and Reporters incorporated the conclusions that we reached during the meeting into a new draft of the act, which was submitted to The Style Committee for its review. The Style Committee provided extensive feedback. We have incorporated Style Committee suggested edits that we think uncontroversial into the "working draft" that you have received.

I. Style Committee Comments, questions and recommendations

Style also flagged a number of issues that are more substantive in nature. The Reporters and Chairs feel that some of these proposed changes that would alter the act in meaningful and problematic ways, or risk undoing nuanced language in the drafts—language sometimes settled upon only after considerable deliberation. We believe these matters should be subjects of full Committee discussion. With that in mind, we detail below the more substantive proposals received from Style, and we briefly discuss the problems these proposals might raise:

- We had proposed changing the title of the act to the "Pretrial Release and Detention Act." Style responded that we should entitle the act the "Pretrial Detention Alternatives Act." The Co-Chairs have begun a discussion that will continue in an effort to persuade those responsible for titles of Acts that our proposed change best reflects the substance of the Act and avoids misunderstandings or unwise intimations of bias or premises.

- Likewise, in Section 102, Style proposed altering our definition of offense to mean "conduct for which a criminal penalty may be imposed." The Committee in previous meetings has discussed this matter and intentionally drafted the act to anticipate that even noncriminal violations may sometimes be the subject of release determinations.

- In Section 201(a)(1), Style asked whether the act intends to authorize arrest an individual facing a pending order of detention from "any jurisdiction," including foreign jurisdictions. We believe the answer is yes. This provision simply provides an exception to no-arrest (citation) rules. It does not require arrest. So, if the authorized official is somehow made aware of a foreign order of detention, we think that is a sufficient

reason to support an exception and permit arrest (if all other arrest requirements have been satisfied).

- In Section 202(3), Style proposed that a citation should include ". . . the possible consequences of violating the requirements of the [citation] or committing another offense while proceedings on the [citation] are pending." The working draft reads differently—*to wit*, ". . . while the charge in the [citation] is pending." We believe that our formulation makes sense, because the citation's requirements attach only *until* the beginning of proceedings. At that point, the citation will be replaced by a release order, which is what controls "while proceedings . . . are pending."

- Throughout the draft act, Style was concerned that the draft act uses the term "authorized official" to mean officials authorized to do different things (for example, arrest versus release on a citation). But we think it is clear that when we use "authorized official" in a particular section, we mean authorized to take whatever actions are covered by that section.

- In Section 301(a), Style proposed the following language: "An individual who is arrested is entitled to a hearing to consider whether the individual should be released pending trial." This is a very big and meaningful change from our draft language: "An individual who is arrested is entitled to a hearing for the purposes of releasing the individual pending trial." As with Style's proposed change to the act's title, the proposed language here would make detention become the default; release would be something that need only be "consider[ed]." The import of this change needs a thoughtful discussion.

- In Section 302, Style added the underlined language: "If the individual is unable to obtain counsel for the hearing, the [authorized agency] shall provide counsel unless waived by the individual." Style may be onto something here. Perhaps, the Committee may want to add this language? Or perhaps it's overly prescriptive? In any event, it's substantive and not a matter of mere structure or style, so we should discuss.

- Style wanted to change the title of Section 303 from "Determination of Risk" to "Judicial Determination." We don't understand this recommendation, since the act includes many judicial determinations. Our working draft titles this section "Determination of Risk" because that is the particular determination at issue here. Whether a combination of "judicial" and "risk" in the title would improve it may be something to consider.

- In Section 303(a), Style eliminated our reference to burdens of proof (*to wit*, "clear and convincing" or "preponderance of evidence"). Style felt this language fit better in Section 304. We are not sure that this is a mere matter of style or structure. The Committee had lengthy discussions about where to include these burdens of proof, and, ultimately, we concluded that the burdens should appear upfront in Section 303(a). Perhaps we're wrong about that, however? Perhaps the work can be done in Section

304 (with a reference back to Section 303)? With that in mind, here is Style's proposed language for Section 304(b):

  - "If the court determines under Section 303 by [clear-and-convincing evidence][a preponderance of the evidence] that the individual is likely to abscond, not appear, obstruct justice, violate an order of protection, or cause [bodily injury to another individual][harm to another person], the court shall determine whether pretrial release of the individual is appropriate under Sections 305, 306, and 307. If the court determines that pretrial release is appropriate, the court shall state in plain language in the order of release the information required by subsection (a) and any restrictive condition or conditions imposed by the court."

- In Section 305(a), Style proposed eliminating the language about addressing an "impediment to appearance" and, instead, inserted language about addressing the "likelihood" of nonappearance. Again, this change misses the point and would flip the focus of the provision on its head. The aim, here, is to promote liberty and equality by counteracting practical "impediments" through practical assistance and voluntary supportive services; the aim is not to diminish liberty and expand inequality through restrictive conditions. We think it is necessary to signal that the act's focus is to provide support, not to effect social control of individuals who risk a high likelihood of nonappearance.

- In several other places, Style proposed changing the draft act's use of terms like "risk" to terms like "likelihood" or "likely." Here and elsewhere, we are dealing with terminology over which we have wrestled considerably.

- In the same vein, in Section 307, Style proposed changing the term "fee" to "amount" or "payment." We discussed this matter extensively during our last meeting. We doubt these alterations are improvements. Indeed, the proposed phraseology is quite confusing or awkward in places (*e.g.*, "recurring amount"). Elsewhere, Style replaced "satisfy" with "pay." Again, this does not seem to be the right term for satisfaction of a financial condition. Nonetheless, the Committee needs to consider this proposal

- Style wondered why we bracket certain policy determinations (*e.g.*, in Section 307, the terms "24 hours" and "three or more"). Style thinks we should aim to settle these policy questions by unbracketing the terms. (Alternatively, Style indicated that we would need to insert additional legislative notes if we want to continue to leave these choices to the states.)

- In Section 308(a)(1), Style replaced "extremely likely" with just "likely." This would be a major substantive—and quite meaningful—alteration. The modifier was included in our draft after considerable discussion (*to wit*, that detention for a mere risk of

nonappearance should be a relative rarity). We believe that the term "extremely" (or some equivalent modifier) should stay.

- In Section 308(b), Style raised questions of when and how an individual has a "right to be heard." Style suggested that the implication of the working draft is that the individual currently only has this ability at the point that the detention order is (or is about to be) imposed. We don't see this as a plausible reading, but this is for the committee to consider.

- In Section 401(a), Style eliminated the language that signaled that a court could hold a release and detention hearing at the same time. The Committee devoted considerable attention to this and felt strongly that the signal needs to be there to promote efficiency for those jurisdictions who want to streamline the process into a single appearance.

- With respect to all time limits (*e.g.*, deadlines for holding release and detention hearings), Style questioned: (i) whether the defendant needs to request the hearing, (ii) how else the hearing is triggered, and (iii) what if the defendant does not want a hearing. The last concern strikes us as wholly implausible. As to the first two concerns, we think the working draft makes clear that the defendant needs to do nothing to trigger a hearing; courts must hold the hearings. Beyond that, we think it is a mistake to get overly prescriptive with the states by defining more precisely the means of initiating hearings.

- In Section 502, Style wondered why in subsections (a) and (b), the act speaks in terms of reconsidering an order, whereas in subsection (c), it speaks in terms of reopening a hearing. Style may be onto something here.

II. Other issues

Section I, above, outlines the matters that Style in its review and comments has generated for the Committee's consideration. This is not to say that there will not be other issues raised during the meeting. Each of you may find in the new draft matters that you believe need revisited. We believed, however, that making the current working draft and these comments available to you in time for some consideration by you before the meeting will be helpful to productive discussions at the meeting.